**U.S. Department of Labor**

Board of Alien Labor Certification Appeals
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**Issue Date: 03 October 2006**

**BALCA Case No.** **2005-INA-186**
ETA Case No. P2004-NJ-02509520

*In the Matter of:*

**ARTIC APPLIANCE INC.,**
*Employer,*

*on behalf of*

**CARLOS ARBEY QUICENO,**
*Alien.*

Certifying Officer: Dolores DeHaan
New York, New York

Appearance: Julio Acevedo, Owner[1]
*Pro se for the Employer*

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

# DECISION AND ORDER

**PER CURIAM.** This case arises from an Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of its application for labor certification. Permanent alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R.").[2] We base our decision on the record upon which the CO denied

[1] Cassandre Lamarre, Esquire, made an entry of appearance before the Certifying Officer; however, the appeal was filed pro se by the Employer's owner.

[2] This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal

certification and the Employer's request for review, as contained in the appeal file ("AF"), and any written arguments. 20 C.F.R. §656.27(c).

## STATEMENT OF THE CASE

On January 8, 1998, the Employer filed an application for labor certification on behalf of the Alien for the position of Electric Appliance Servicer. (AF 133-144).

On January 27, 2005, the CO issued a Notice of Finding (NOF) approving the Employer's request for Reduction in Recruitment but indicating the intent to deny the application on the ground that it appeared that the Employer had ceased to exist, as the Employer did not appear in the telephone directory, mail to the Employer was returned as undeliverable, and the Employer's state unemployment insurance account was not active. To remedy the deficiency, the Employer was directed to produce its incorporation documents since its inception, provide employment records for the years 2003 and 2004, provide the names and positions of all the employees from the year 2001 to the year 2004 and provide its income tax returns for the years 2001, 2002 and 2003.

The CO also noted that the rate of overtime payment offered in the ETA 750A was not the required rate by law, which was a violation of 20 C.F.R § 656.20(c). Therefore, the CO directed the Employer to amend the overtime pay rate. Additionally, the CO noted that it did not appear that the Alien had the requisite two years of experience at the time he was hired. The Employer was required to either demonstrate that the Alien complied with the requirement when he was hired or delete the requirement. (AF 75-78).

On March 17, 2005 the Employer submitted its Rebuttal. (AF 31-72). The Employer in its Rebuttal supplied a business card reflecting its name as "Morris County Service & Artic Appliance," a copy of the 2003 income tax return for "Artic Appliance Parts and Sales, Ser, Inc.," a copy of the 2004 Employer Annual Federal Unemployment Tax Return for "Morris

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Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

County Appliance," copies of the 2004 New Jersey employer's reports for "Morris County Appliance," and the 2004 income tax return for "Morris County Appliance Service, Inc." The rebuttal also included a letter from the Alien's former employer confirming that he worked in the telecommunications industry for four years, and an amended form ETA-750A reflecting the employer as "Morris County Appliance Service, Inc." No letter of support accompanied the documents submitted.

On April 7, 2005, the CO issued a Final Determination (FD) denying certification. (AF 28-30). The CO noted that the income tax returns supplied were for two different employers, as they had different names and different federal identification numbers. The CO noted that changing employers was not an option provided by the NOF. The CO also noted that the Employer in its Rebuttal failed to provide the employment records from the year 2001 to the year 2004, as the NOF required. The Rebuttal also failed to address the Employer's violation of the state laws regarding overtime pay. The CO also observed that the Alien's prior experience, according to his former employer, was in telecommunications and not in appliance repairs. Therefore, the Employer failed to demonstrate that the Alien had the prerequisite experience before being hired by Employer. Additionally, the CO found that the Employer failed to demonstrate that it had an ongoing business in the United States. For the noted reasons Employer denied the labor certification.

On May 11, 2005, the Employer filed its Request for Review (AF 1-27). The Employer asserted that it had complied with all the requests by the CO. The Employer also asserted that the two companies it supplied documents for were the same company, except that the names were changed. The Employer argued that its payroll tax returns demonstrated that it is in compliance with the employment laws. The Employer asserted that only some of the letters from the Alien's former employers were received by the CO. Therefore, the Employer enclosed the missing letters addressing the Alien's experience. To demonstrate that it existed as a business entity, the Employer provided a copy of its current water bill. Additionally, the Employer supplied a copy of a certificate showing a change of agent for "Morris County Appliance Service, Inc.," a list of Employees for the years 2001 to 2005, and additional payroll data.

## DISCUSSION

The CO in the NOF questioned the existence of a business operated by the Employer. The CO's doubts were triggered by the fact that a letter addressed to the Employer was returned by the U.S. Postal Service as undeliverable, and by the fact that the Employer's state unemployment insurance account was inactive. To remedy the deficiency, the Employer was asked to produce the incorporation documents since its inception, provide employment records for the years 2003 and 2004, provide the names of employees from the year 2001 to the year 2004 and the income tax returns for the years 2001, 2002 and 2003. Therefore, the CO's concerns could have been easily addressed by providing the documents that all corporations must obtain and keep by law.

If the CO requests a document which has a direct bearing on the resolution of an issue and is obtainable by reasonable efforts, the employer must produce it. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc).* Denial of certification is proper when an employer fails to provide reasonably requested information. *O.K. Liquor*, 1995-INA-7 (Aug. 22, 1996); *China Inn Restaurant*, 1993-INA-496, 497 (Aug. 26, 1994). An employer's failure to comply with the CO's reasonable request for information constitutes a ground for the denial of certification. *See The Whistlers*, 1990-INA-569 (Jan. 31, 1992).

The burden of proof, in the twofold sense of production and persuasion, is on the employer. *Cathay Carpet Mills, Inc.*, 1987-INA-161 (Dec. 7, 1988) (*en banc*). The employer bears the burden in labor certification both of proving the appropriateness of approval and ensuring that a sufficient record exists for a decision. 20 C.F.R. § 656.2(b); *Giaquinto Family Restaurant*, 1996-INA-64 (May 15, 1997). Denial of certification has been affirmed where the employer has made only generalized assertions. *Winner Team Construction, Inc.*, 1989-INA-172 (Feb. 1, 1990). Although a written assertion constitutes documentation that must be considered, a bare assertion without supporting reasoning or evidence is generally insufficient to carry an employer's burden of proof. *Gencorp*, 1987-INA-659 (Jan. 13, 1988) (*en banc*). An employer's last opportunity to supplement the factual issues of the case is in the Rebuttal. 20 C.F.R. §

656.24. Therefore, it is the employer's burden at that point to perfect a record that is sufficient to establish that a certification should be issued. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*).

The Employer in the NOF was provided an opportunity to demonstrate that it was a bona fide employer. The Employer, however, wasted that opportunity by limiting its Rebuttal to providing a business card, an income tax return for one of the three years requested, along with evidence regarding a different employer, which did not comply with the NOF's request. Employer's wasted opportunity to prove its case was fatal to the labor application. As the Employer never provided the articles of incorporation, payroll data requested, or income tax returns for the years 2001 and 2002,[3] and since Employer's general assertions, without more, are insufficient to demonstrate that it is a bona fide employer, we find that the Employer did not meet its burden of proof.

Consequently, as the record supports the CO's findings and for the above stated reasons, we affirm the CO's denial.[4]

[3] The Employer supplied a series of documents with its Request for Review; those documents, however, could not be considered by this Panel, because our review must be based on the record upon which the CO reached her decision. Evidence first submitted with the Request for Review cannot be weighed. *Memorial Granite*, 1994-INA-66 (Dec. 23, 1994).

[4] Additionally, the CO in the NOF noted that it did not appear that the Alien had the required two years of experience at the time he was hired. The Employer was required to either demonstrate that the Alien complied with the requirement when he was hired or delete the requirement. Evidence demonstrating that the Alien had the required experience should also have been easily obtained from previous employers. However, the Employer failed to demonstrate that the Alien had the requisite experience and the Employer did not delete the requirement. The evidence provided by the Employer, instead, indicated that the Alien had experience in another business environment, not repairing appliances. Therefore, the Employer did not demonstrate that the Alien met the requirements at the time he was hired, which is an alternative ground for affirming the CO's denial. 20 C.F.R § 656.25(e) provides that the employer's rebuttal evidence must rebut all of the findings in the NOF and that all findings not rebutted shall be deemed admitted. *Belha Corp.*, 1988-INA-24 (May 5, 1989) (*en banc*).

## ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the Panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk**
**Office of Administrative Law Judges**
**Board of Alien Labor Certification Appeals**
**800 K Street, N.W., Suite 400**
**Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.